In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1008

PORTLAND CEMENT CORPORATION, PETITIONER

v.

ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-53) is reported at 486 F. 2d 375.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1973. A timely petition for rehearing *en banc* was denied on October 1, 1973. The petition for a writ of certiorari was filed on December 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Section 111 of the Clean Air Act, 84 Stat. 1683, as added, 42 U.S.C. 1857c-6, and Section 102(2)(C) of the National Environmental Policy Act, 83 Stat. 853, 42 U.S.C. 4332(C), are set forth at Pet. App. 57-63.

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency must prepare an environmental impact statement, pursuant to the National Environmental Policy Act, 42 U.S.C. 4332(C), prior to promulgating new source emission standards under the procedures required by Section 111 of the Clean Air Act, as added, 42 U.S.C. 1857c-6.

2. Whether the court of appeals should have vacated the regulation establishing new-source emission standards because it was remanding the case to the Administrator for consideration and clarification of certain matters concerning the methodology of tests performed by the Administrator.

STATEMENT

Section 111(b) of the Clean Air Act, as added, 42 U.S.C. 1857c-6(b), provides that within 90 days of the enactment of the Act the Administrator of the Environmental Protection Agency shall publish a list of categories of significant stationary air pollution sources which he determines may contribute to the endangerment of public health or welfare. 120 days thereafter, the Administrator is required to publish proposed federal standards for new sources of air pollution within each category and to provide opportunity for interested persons to comment on the proposed regulations. 90 days thereafter, he is required to promulgate the standards, with such modifications as he may deem appropriate. The standards became effective on promulgation but may be modified from time to time.

On August 17, 1971, the Administrator published proposed standards for five categories of air pollution sources, including Portland cement plants, together with a "Background Document" explaining the basis for the

regulations. After receipt of various objections and comments, the Secretary, on December 23, 1971, promulgated the standards, including those for Portland cement plants (Pet. App. 3-5). Petitioner sought review in the United States Court of Appeals for the District of Columbia Circuit. On June 29, 1973, that court affirmed in part, reversed in part, and remanded the case to the Agency for further proceedings (Pet. App. 1-53). The court held that (1) the Administrator, in complying with the detailed provisions of Section 111 of the Clean Air Act, was not required to file what would have been essentially a duplicative environmental impact statement, as urged by petitioner, prior to promulgating new source emission standards (Pet. App. 5-21), and (2) the case should be remanded to the Administrator for consideration and clarification of certain matters raised by petitioner concerning testing methodology, but the regulations promulgated by the Administrator should not be set aside in the interim (Pet. App. 36). Petitioner seeks further review in this Court.[1]

ARGUMENT

1. Contrary to petitioner's intimations (Pet. 18-20), the court of appeals did not hold the National Environmental Policy Act, 83 Stat. 852, 42 U.S.C. 4321, *et seq.* (NEPA), inapplicable to the activities of the Enivronmental Protection Agency (EPA). Rather, it specifically limited its decision to a holding that EPA need not file an impact statement prior to promulgating new source performance standards under Section 111 of the Clean Air Act. The court, after a thorough analysis

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[1]Although the court below, in its opinion, expressed its willingness to consider an application for a stay of the contested regulation "based on probability of success and furtherance of the public interest" (Pet. App. 36), petitioner did not seek a stay.

of the two Acts, concluded that "section 111 of the Clean Air Act, properly construed, requires the functional equivalent of a NEPA impact statement" (Pet. App. 16).

The court reasoned that the weighing and balancing of environmental considerations and economic costs required in an environmental impact statement are required by the Clean Air Act as well and are to be set forth in the reasons given by the Administrator to support the standards (Pet. App. 17-19, 21-24). Thus filing an environmental impact statement would be duplicative and inconsistent with the detailed provisions and time schedule of Section 111 of the Clean Air Act (Pet. App. 5-21). This, in our view, is the correct and reasonable correlation of these two environmental protection Acts.

The rigid time constraints imposed by Congress in the Clean Air Act (*supra,* p. 2) require prompt and effective action by the Administrator in establishing the new source standards. Both environmental and cost factors must be considered by the Administrator, and industry and public comments are sought (and were received here). The court thoroughly considered the legislative histories of the two Acts (Pet. App. 6-15) and correctly concluded that Congress did not intend the Administrator of the Environmental Protection Agency to delay and duplicate procedures by preparing an impact statement under NEPA procedures in addition to following the parallel procedures of Section 111 of the Clean Air Act.

2. The decision of the court below is in accord with its own prior decisions and with decisions in other circuits. The question whether the Administrator of the Environmental Protection Agency must file an environmental impact statement under other sections of the

Clean Air Act has arisen in several circuits, and the courts have uniformly decided that the impact statement requirements of NEPA are not applicable to such actions. *Anaconda Co.* v. *Ruckelshaus,* 482 F. 2d 1301 (C.A. 10); *Appalachian Power Co.* v. *Environmental Protection Agency,* 477 F. 2d 495 (C.A. 4), certiorari denied, April 29, 1974 (No. 73-1038); *Duquesne Light Co.* v. *Enivronmental Protection Agency,* 481 F. 2d 1 (C.A. 3); *Getty Oil Co.* v. *Ruckelshaus,* 467 F. 2d 349 (C.A. 3); *Buckeye Power, Inc.* v. *Environmental Protection Agency,* 481 F. 2d 162 (C.A. 6); *Essex Chemical Corp.* v. *Ruckelshaus,* 486 F. 2d 427 (C.A. D.C.); *International Harvester Company* v. *Ruckelshaus,* 478 F. 2d 615 (C.A. D.C.).

3. Petitioner argues essentially that a court, in reviewing the adoption of a regulation by an administrative agency, necessarily must vacate the regulation if a remand is required. This conclusion would be disruptive of the processes of orderly administrative action and review and is legally unsound. *Camp* v. *Pitts,* 411 U.S. 138, relied upon by petitioner, requires no such result.

In *Camp,* the Court held that a reviewing court may not undertake a *de novo* review of agency action unless it finds the fact-finding process by which the agency record was made inadequate. The Court emphasized the importance of the administrative record and encouraged, rather than precluded, a remand to the agency for additional explanations or considerations if that record is unclear (411 U.S. at 143). See also *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402. The sensibleness of remand where the record is unclear is illustrated by the present case. The court of appeals did not find the Administrator's action invalid or conclude that on the administrative record it could do so. Rather it decided that the administrative record

should be supplemented to allow an informed answer to certain questions that petitioner had raised. In the interim the regulation, which the court did not find invalid on the record, is still entitled to the presumption of validity accorded any regulation. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 101; *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 69. See Pet. App. 36. And see *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373; *Placid Oil Corp.* v. *Federal Power Commission*, 483 F. 2d 880 (C.A. 5), certiorari granted *sub nom. Mobil Oil Corp.* v. *Federal Power Commission* (Nos. 73-437, 73-457 and 73-464, January 14, 1974, and argued, April 17, 1974).

The remand proceedings are currently being conducted by the Administrator and, when they are completed, petitioner will have the opportunity to challenge further the source standards, whether altered or not, based on the supplemented administrative record.[2]

4. Petitioner is incorrect in stating that the Administrator's establishment of different standards for different industries is arbitrary and not rationally related to the statutory purpose. Section 111 requires that standards be established on the basis of the levels achievable with the best adequately demonstrated system of emission reduction, taking cost into account. Different industries have different technical situations and may require different control systems. Even applying the same systems may yield different levels of pollution control. The court below correctly observed that each industry standard must be

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[2]Vacating the standards here would have the effect of postponing the effective date of the standards from August 17, 1971, (the date of proposal, see 42 U.S.C. 1857c-6(2)) until the new standards are set—possibly to the competitive detriment to those who have started or completed construction of plants to comply with the 1971 standard, and contrary to Congress' emphasis in the Act on expeditious regulation subject to subsequent revision.

judged by the application of the requirements of Section 111 to that industry (Pet. App. 26-27).

Even if it should be found that a standard applied to one industry is too generous, compared to an otherwise valid standard imposed on another industry, the remedy is to make the generous standard more stringent to meet the strict requirements of Section 111, not to relax the proper standard. Moreover, the Clean Air Act specifically calls for the establishment of separate categories of stationary air pollution sources (Pet. App. 58), recognizing that each industry may have its own problems. Petitioner did not object to the designation of Portland cement plants as one such category, and does not contest the separateness of cement technology from that of power plants or other industries. Especially in these circumstances the application here of separate regulations for different categories of pollution sources was proper.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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